

IN THE COURT OF APPEALS OF THE STATE OF IDAHO

Docket No. 36276

STATE OF IDAHO,)	2009 Unpublished Opinion No. 687
)	
Plaintiff-Respondent,)	Filed: November 24, 2009
)	
v.)	Stephen W. Kenyon, Clerk
)	
DENNIS A. ORR,)	THIS IS AN UNPUBLISHED
)	OPINION AND SHALL NOT
Defendant-Appellant.)	BE CITED AS AUTHORITY
)	

Appeal from the District Court of the Second Judicial District, State of Idaho, Idaho County. Hon. John H. Bradbury, District Judge.

Order of the district court denying motion for new trial, affirmed.

Dennis A. Orr, Boise, pro se appellant.

Hon. Lawrence G. Wasden, Attorney General; Rebekah A. Cudé, Deputy Attorney General, Boise, for respondent.

GRATTON, Judge

Dennis A. Orr was convicted of first degree murder in 1989. Idaho Code § 18-4001. In 2008, Orr filed a motion for new trial under Idaho Criminal Rule 34. The district court denied the motion as untimely. We affirm.

I.

FACTUAL AND PROCEDURAL BACKGROUND

Dennis A. Orr was convicted of first degree murder under I.C. § 18-4001 and sentenced to a unified term of life with twenty-five years determinate. Orr appealed, and the Idaho Supreme Court affirmed his conviction and sentence. *State v. Orr*, 123 Idaho 55, 844 P.2d 684 (1992).

On September 11, 2008, Orr filed a motion for a new trial under I.C.R. 34. The State subsequently filed a motion to dismiss which was granted by the district court for the reason Orr's motion was untimely. Orr appeals.

II. ANALYSIS

Orr primarily argues he should receive a new trial because he was only provided one attorney during his murder trial in violation of 18 U.S.C. § 3005. He interprets the federal statute to allow defendants two attorneys in state capital cases. Idaho Rule of Criminal Procedure 44.3, Idaho's equivalent to the federal statute, provides a defendant with two attorneys in capital cases. However, this rule did not take effect until January 1999. Orr argues the statute, recently discovered by him, should be treated as new evidence making a new trial appropriate. He further argues that the statutory period for filing motions for new trials should not apply in his case because he suffered prosecutorial misconduct, ineffectiveness of counsel, and conflicts of interest with counsel. Orr's additional claims for a new trial need not be addressed as his motion is untimely.

Whether a trial court properly applied a statutory provision to the facts of a particular case is a question of law over which we exercise free review. *State v. Horn*, 124 Idaho 849, 850, 865 P.2d 176, 177 (Ct. App. 1993). A motion for new trial is properly denied when untimely, thus making it unnecessary to address the merits of the claim. *State v. Freeman*, 85 Idaho 339, 343, 379 P.2d 632, 633-34 (1963). It is well settled that the courts cannot grant new trials after the statutory period. *State v. Davis*, 8 Idaho 115, 66 P. 932 (1901). "The application for a new trial may be made before or after judgment; and must be made within the time provided by the Idaho criminal rules unless the court or judge extends the time." I.C. § 19-2407. District courts have no jurisdiction to grant new trials outside of the periods established in Idaho Criminal Rule 34. *State v. Parrott*, 138 Idaho 40, 42, 57 P.3d 509, 511 (Ct. App. 2002). Idaho Criminal Rule 34 states:

. . . A motion for a new trial based upon the ground of newly discovered evidence may be made only before or within two (2) years after final judgment. A motion for a new trial based on any other ground may be made at any time within fourteen (14) days after verdict, finding of guilt or imposition of sentence, or within such further time as the court may fix during the fourteen (14) day period.

For purposes of applying the time limit for newly discovered evidence, "final judgment" is considered as the date the appellate court relinquishes jurisdiction. *Parrott*, 138 Idaho at 42, 57 P.3d at 511.

Orr argues that the district courts have the inherent authority to grant a new trial because of fraud on the court, an unfair trial, or violation of constitutional rights and cites *Compton v. Compton*, 101 Idaho 328, 612 P.2d 1175 (1980). The language of Idaho Rule of Civil Procedure 60(b) that *Compton* was concerned with guaranteed a district court's authority to relieve a party from a civil judgment in the presence of "an extreme degree of fraud." *Id.* at 335, 612 P.2d at 1182. However, *Compton* was a civil case, and I.C. § 19-2407 and I.C.R. 34, which control Orr's motion for a new trial, expressly limit the time to grant new trials without a similar guarantee of a district court's inherent authority.

Orr's reliance on *United States v. Wood*, 57 F.3d 733, 739 (9th Cir. 1995) which states: "Justice done late is better than justice not done at all," does not provide authority to ignore the time limits of I.C.R. 34. In *Wood*, the motion was timely filed under the federal rule. *Id.* at 736-37. Justice was "late" because the defendant had already served his sentence.

Orr argues that the prosecutor's closing arguments and a witness's inconsistent statements should allow him a new trial. His reliance on *Mesarosh v. United States*, 352 U.S. 1 (1956), is misplaced because there the federal government requested the conviction to be revisited after it discovered that its primary witness and paid informant was untruthful in his testimony. The Court emphasized it was not reviewing a defendant's motion for a new trial, which would have been governed by Federal Rule of Criminal Procedure 33. *Id.* at 6. Here, Orr's motion for a new trial is controlled by I.C.R. 34.

Assuming Orr discovered new evidence,¹ he had two years from final judgment to move for a new trial.² The Supreme Court denied rehearing Orr's appeal of his conviction on February 3, 1993. *State v. Orr*, 123 Idaho 55, 844 P.2d 684 (1992). His motion on August 20, 2008, was well outside the time limit set by I.C.R. 34. The district court was correct in determining it had no jurisdiction to grant the motion.

¹ The Court does not need to address the State's argument that the federal statute does not apply or that the statute is not newly discovered evidence.

² In this case, Orr does not argue, and there is no indication in the record, that the district court granted more time for filing a motion for new trial.

III.

CONCLUSION

Orr's motion for a new trial under I.C.R. 34 is untimely. The district court's denial of his motion for a new trial is affirmed.

Judge GUTIERREZ and Judge MELANSON, **CONCUR.**